Foster Electric, Inc. *and* Local Union 697, International Brotherhood of Electrical Workers, AFL–CIO. Cases 13–CA–30120 and 13–RC–18184

September 30, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On March 27, 1992, Administrative Law Judge Arline Pacht issued the attached decision. The General Counsel and the Respondent filed exceptions and supporting briefs and the General Counsel filed a brief in response to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Foster Electric, Inc., Highland, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following after paragraph 2(a) and reletter the subsequent paragraphs.

''(b) Make employee Isidro Nascianceno whole for any loss of earnings suffered as a result of his layoff on March 8, 1990, with interest.''

2. Substitute the attached notice for that of the administrative law judge.

[1] On May 12, 1992, the Respondent filed a motion requesting that the record be reopened to receive into evidence charges filed by discriminatee Isidro Nascianceno with the Indiana Civil Rights Commission and the Equal Employment Opportunity Commission alleging that he was discharged because of his national origin/Hispanic ancestry. The Respondent asserts that if Nascianceno's claim of discharge because of national origin were admitted into evidence, the judge could not find that Nascianceno was discharged because of his union activity. On May 26, 1992, the General Counsel filed a response to the motion and on May 29, 1992, the Respondent filed a response to the General Counsel's response. The Respondent's motion is denied, as the proffered evidence would not alter the result in this case. See *Central Broadcast Co.*, 280 NLRB 501 fn. 1 (1986); Board's Rules and Regulations, Sec. 102.48(d)(1).

The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent has excepted to the judge's finding that on March 7, 1991, Swalek, the Respondent's vice president, learned from Daugherty, the Union's business representative, that Nascianceno was a ''complainant'' in the unfair labor practice charge filed the week before. The Respondent contends that the record does not support such a finding and that Nascianceno's March 8 layoff was for reasons unrelated to his union activity. We disagree. Daugherty testified without contradiction that he specifically mentioned Nascianceno by name to Swalek in their March 7 discussion of the allegations contained in the charge. In this regard, Daugherty explained to Swalek that the allegation relating to the threat of discipline or discharge of employees who voiced dissatisfaction with the Employer referred to Swalek's statement to Nascianceno, on Nascianceno's return to work after a 2-day illness, that Swalek would accept his doctor's excuse but that the Union would require him to return to the hall. On cross-examination, Daugherty again testified without contradiction that he identified Nascianceno to Swalek on March 7 in explaining this allegation. In these circumstances, we agree with the judge that Swalek identified Nascianceno as a complainant to Swalek on March 7.

At fn. 23 of her decision, the judge stated incorrectly that if Nascianceno returned to work, he would be the fourth of the seven employees who had signed authorization cards. If Nascianceno returned to work, he would, in fact, be the third employee still working for the Respondent who had signed an authorization card. In this regard, we note that employee Jim Swalek never signed an authorization card.

Chairman Stephens would not find that the Respondent impliedly threatened its employees with a decrease in wages by initially misrepresenting the union-entry level wage.

[2] In agreeing with the judge that the election should be set aside, we find it unnecessary to rely on her finding that the Respondent engaged in objectionable conduct by holding a pizza party the night before the election.

We agree with the judge that a *Gissel* bargaining order is required in the circumstances of this case where Swalek, the Respondent's vice president who manages the Company and directs the employees on a daily basis, committed numerous violations, including certain ''hallmark'' violations, that affected the entire small bargaining unit. See, e.g., *Astro Printing Services*, 300 NLRB 1028 (1990).

[3] The General Counsel has excepted to the judge's failure to include in her recommended Order a provision making Nascianceno whole for any loss of earnings he may have suffered as a result of his unlawful layoff on March 8, 1991, and to the judge's failure to conform the notice to the Order. We find merit in these exceptions and shall modify the recommended Order and substitute a new notice accordingly.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT lay off, discharge, or otherwise discriminate against you for supporting Local Union 697, International Brotherhood of Electrical Workers, AFL–CIO, or any other union.

WE WILL NOT lay off, discharge, or otherwise discriminate against you for participating in the filing of charges with the National Labor Relations Board.

WE WILL NOT threaten you with closure of the business, loss of jobs, a decrease in pay, or loss of employment conditions if you support or select the Union as your collective-bargaining representative.

WE WILL NOT coercively interrogate you about your union support or sympathies.

WE WILL NOT promise you benefits such as a pension plan, increased wages, and tuition payments in order to discourage you from supporting or selecting the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following appropriate bargaining unit:

All full-time and part-time electrical workers, electricians, and helpers employed at the Employer's facility presently located at 8344 Kennedy Avenue, Highland, Indiana; but excluding all managers, clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL offer Isidro Nascianceno immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL make Isidro Nascianceno whole for any loss of income resulting from his layoff on March 8, 1991, plus interest.

WE WILL notify Isidro Nasianceno that we have removed from our files any reference to his layoff and discharge and that the layoff and discharge will not be used against him in any way.

FOSTER ELECTRIC, INC.

Jessica T. Willis, Esq., for the General Counsel.
Charles R. Deible, Esq., of Hammond, Indiana, for the Respondent.

DECISION

STATEMENT OF THE CASE

ARLINE PACHT, Administrative Law Judge. Upon a charge filed on March 19, 1991, as amended on April 26,[1] by Local Union 697, International Brotherhood of Electrical Workers, AFL–CIO, a complaint issued on April 9 alleging that the Respondent, Foster Electric, Inc., violated Section 8(a)(1), (3), and (4) of the National Labor Relations Act.[2]

Subsequent to an election held on March 22 among Respondent's employees, the Union filed objections on March 29. On April 30, the Regional Director for Region 13 issued a report on objections, order consolidating cases, and notice of hearing consolidating Cases 13–CA–30120 and 13–RC–18184 for trial. On May 9, Respondent filed a timely answer to the consolidated complaint denying the commission of any unfair labor practices.

The case was tried on October 15 to 17 in Chicago, Illinois, at which time the parties were afforded full opportunity to examine and cross-examine witnesses, and to introduce relevant documents.[3] On the entire record, including my observation of the demeanor of the witnesses, and after considering the parties' posttrial briefs, I make the following

FINDINGS OF FACT

Jurisdiction

As Respondent admits the allegations in the complaint pertaining to its doing business in interstate commerce, I find that Foster Electric is an employer within the meaning of Section 2(2), (6), an (7) of the Act. Based on uncontroverted evidence, I also find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

The Union's Organizational Campaign

Respondent, a residential and commercial electrical contractor, with offices in Highland, Indiana, is a closely held corporation which is managed by Company Vice President Fred Swalek.[4] At the time of the events giving rise to this proceeding, the Respondent employed eight persons as electricians or electricians' helpers.

In the summer of 1990, one of Respondent's electrician helpers, Isidro Nascianceno (Sid), applied for admission to the Union's apprenticeship training program to qualify as an electrician. In September, Sid met Local 697's business agent, Michael Daugherty, and agreed to assist him in organizing other employees at Foster Electric. During a subsequent meeting on October 1, Sid signed a union authorization card which Daugherty had provided. He also supplied the union business agent with the names, addresses, and tele-

[1] Unless otherwise noted, all events took place in 1991.

[2] Local Union 697 will be referred to as ''the Union''; Foster Electric, Inc. as ''the Respondent''; and the National Labor Relations Act as ''the Act.''

[3] Exhibits offered by counsel for the General Counsel (General Counsel) will be designated G.C. Exh. and Respondent's exhibits as R. Exh. followed by the appropriate exhibit number. Transcript references will be cited as Tr. followed by the page number. R. Exh. 12, 13, and 14, submitted after the hearing, are admitted into evidence without objection.

[4] There are three other corporate officers and shareholders who take no active role in the management of the Company.

phone numbers of his coworkers. During the balance of the month, Daugherty met privately with all but one of the other employees and obtained their signatures on authorization cards as well.[5] Daugherty testified that he explained to each employee that his signature was needed before the Union could represent him, that he retained the right to revoke his authorization at any time either by oral or written request, and that the signed card could be used by the Union to support its request to the employer for voluntary recognition or to petition for an election.

After obtaining signatures on seven cards, Daugherty telephoned Fred Swalek and arranged a meeting which took place on November 27. At this time, Daugherty spoke in general terms about the Union's benefits. Thereafter, the two spoke by phone on several occasions and then met in person once again in January. On this occasion, Daugherty explained the Union's examination procedures and described the wage rate structure. Daugherty believed that he told Swalek that although the lowest wage rate was $7.13, an employer had the option to ''redline'' an employee's earnings; that is, to continue paying an individual the same wage rate if it exceeded the union wage. In addition, Daugherty described the Union's no-fail examination process which was used to determine the employee's level of skill.

Two weeks later, the two men met again and at this time, Daugherty presented Swalek with a contractor's package and explained its contents, including, inter alia, information about the requirements to become a signatory to the collective-bargaining agreement, wage information literature and a letter of assent by which the employer adopts the labor contract between the Union and the National Electrical Contractors Association (NECA).

According to Daugherty, at this meeting, Swalek assured him he had consulted with his attorney and accountant and was agreeable to becoming a union contractor. However, he indicated he wanted to seek his employees' views about joining the Union and intended to meet with them within the week. Swalek declined Daugherty's offer to attend such a meeting, indicating that he first preferred to meet with the employees alone.

Daugherty further testified that he spoke with each employee to alert them of Swalek's intent to meet with them. Then, in early February, Daugherty telephoned Swalek to ask about the outcome of the meeting. Swalek informed him that the workers were opposed to the Union and that the married men were particularly concerned about having to take an unpaid day off to attend the Union's apprenticeship school. In fact, Daugherty learned during one of his several meetings with the workers that Swalek had not spoken to them about the Union or assessed their views on representation.

A week later, after obtaining the consent of the seven men who had signed authorization cards, Daugherty filed a petition for an election with the National Labor Relations Board. During a subsequent telephone conversation, Swalek expressed ''concern about what (Daugherty) had gotten him into.'' (Tr. 73) and asked the union agent to identify the employees with whom he had spoken. Daugherty refused to do so.

[5] Daugherty chose not to call on one employee, Jim Swalek, because he was the brother of Respondent's owner, Fred Swalek.

The Respondent's Countercampaign

In the latter part of February, Swalek discussed the Union on numerous occasions with the employees during impromptu meetings at the shop. At the outset of one such meeting on or about February 26, just after Respondent was notified that the Union had petitioned for an election, Swalek told the men that they were free to vote as they chose.[6] Then, he launched into a discussion of working conditions with and without the Union. According to several employees, he asserted that their starting rate under union wage scales would be $5.36 an hour, while he would have to contribute $5.80 per man hour to cover the cost of benefits. He went on to contend that he could not afford the Union, that he would have to raise his bids, would lose work, and have to close his doors. In addition, Swalek pointed out that while he was a lenient boss who excused tardiness and granted sick leave, such conduct would not be tolerated by the Union so that the men would lose their jobs. When one of the employees remarked that the Union offered better wages and benefits as well as an opportunity to go to apprenticeship school, Swalek responded that if the men wanted training, he would pay for them to take night courses at a nearby technical institution, Prairie State, as he had in the past. Lefkofsky testified that Swalek described certain benefits he intended to obtain for them such as a retirement fund and health insurance. Several of the employees further stated that Swalek mentioned a pension and profit sharing plan, a matter which he had raised in the past. They also said he wanted to grant them well-deserved raises, but would have to defer them at the present time, in part because of the Union's advent.

Sid testified that he questioned Swalek about the accuracy of several of his remarks during this meeting. First, Sid pointed out that Swalek's pay scale figures differed from those which the Union had presented to the men. He then asked if Daugherty could speak to the entire group about this matter, but Swalek said such a meeting would be pointless. Sid also wondered aloud why Swalek had not mentioned a pension plan prior to this time. Swalek answered that there was no need to do so.[7] Sid claimed that Swalek then pointedly told him if he was so interested in the Union, he should apply to its apprenticeship program.

Shortly after this group meeting, Lefkofsky spoke privately with Swalek and asked for a raise he had been promised a year before, but Swalek said he could not promise him anything at that time. Swalek also repeated his contention that journeymen were paid $5.35 an hour, that under the Union, the men would work only 32 hours a week, and that he probably would not be able to retain all his current employees if they failed to qualify as journeymen on the Union's test.

Daugherty telephoned Swalek after the February 26 meeting on hearing from some of the employees about their employer's statements. During their conversation, Swalek expressed concerns about going out of business and bidding on union jobs. Daugherty explained that there was a gradual transition to the status of union contractor and advised him to contact a representative of NECA (the National Electrical Contractors' Association) who could advise him about pro-

[6] The description of this meeting is based on the generally consistent accounts of Sid, Lefkofsky and Mark Lollack.

[7] Sid admitted on cross-examination that Swalek had alluded to a 401-K plan in the past, but only as something he hoped to do.

grams to assist employers with job bidding and other business procedures.

A former employee, Charles Miller, testified about another meeting on February 28 at which Swalek again spoke about what might occur should the Union prevail. Thus, Miller recalled that Swalek said there would be no transition period during which the Respondent would shift from nonunion to union status and that he would have to pay inflated wage rates and benefits. As a result, he would be compelled to charge higher rates which would cause a loss of contracts and force him to close his doors.[8] Miller further maintained that on more than one occasion, Swalek said, ''I would rather close my doors than go union.'' (Tr. 238–239.)

Daugherty filed an unfair labor practice charge with the Board on February 28. The following week, during another telephone conversation, Swalek and Daugherty discussed each allegation in the charge. Specifically, Daugherty cautioned Swalek against telling his employees that representation would mean their wages would be lowered to $5.30 an hour when the Union's lowest wage rate was, in fact, $7.12. Daugherty also testified that he reminded Swalek about the custom of ''redlining,'' a practice which permitted a contractor to continue paying an employee a higher wage rate even if he did not score well on the test administered by the Union to determine a worker's electrical knowledge. The two men next discussed another element in the charge alleging that the Respondent had threatened to discipline or discharge employees who voiced ''dissatisfaction with the Employer.'' (G.C. Exh. 4.) Daugherty told Swalek that in filing this charge, he was referring to a situation involving Sid Nacianceno who, after being absent on February 27 and 28, returned to work with a doctor's excuse for those 2 days. At that time, Sid stated that Swalek cautioned him that such absences would not be tolerated if the shop was organized; instead, he would be required to return to the union hall. Following this conversation, Swalek informed the workers of the correct starting wage for union apprentices.

Miller described another conversation with Swalek on March 1 when he and his partner, Dave Sabol, returned to the shop at the end of the day. Stating that he wanted to talk to them individually, Swalek first spoke privately with Sabol for approximately half an hour. Then, he met with Miller and asked him how he felt about the Union. When Miller replied that he still was unsure, Swalek said everyone had a right to choose but the men better know what they were getting into. As far as he was concerned, however, if the Union was successful in its organizational effort, he would not be able to afford to fulfill his dreams for the Company. Swalek then started to discuss a 401-K plan and showed Miller a brochure about it. Miller seized the opportunity to ask for a raise and also mentioned his interest in the Union's educational program. Swalek indicated that raises would depend on his profit margin, but assured Miller that he would help him pay for training at Prairie State College. Swalek recalled this meeting and except for denying that he asked Miller about his union sympathies, did not expressly repudiate any of the other comments which Miller attributed to him.

Lollack, who still was in Respondent's employ at the time of the hearing and whose loyalty to his employer was palpable, testified unwittingly that Swalek repeatedly said he ''would close his doors if we went union. (Tr. 393.) Lollack also disclosed that Swalek often commented that ''if any of you guys want to go union, quit and go join the union. . . . There are plenty of shops that are hiring that are union shops. Quit and go work for them'' (Tr. 382).

Swalek offered a more benign version of various remarks he made during the preelection period. He explained that after receiving instructions from the Board, he believed he could not bestow any benefits upon the employees in the period preceding the election and explained as much to the men. Specifically, he told them he could not implement a pension and profit sharing plan or grant raises prior to the election.

He also acknowledged that he discussed the possible losing of the Company with his employees on at least three or four occasions, but insisted that his comments invariably followed a uniform script. He stated that he consistently explained to the workers that after comparing the Union's wage rates with the rates he charged his current contractors, he concluded that he would have to raise his rates to meet union scale. The contractors with whom he did business told him that they could not accept any increase in labor costs and therefore, would transfer their business to other companies. Consequently, Swalek concluded that he eventually would be unable to sustain his overhead and costs and eventually would go out of business. However, he urged his employees not to be concerned about him for he would survive.

Swalek also admitted that he made certain statements to his employees as to the likelihood that under a union regime, they would not retain their positions at Foster Electric. He explained that his remarks stemmed from the belief that none of his workers would qualify as journeymen under the Union's testing program. Consequently, since he assumed that he would be permitted to retain only two of his men as apprentices, he told the employees that the Union would refer the rest of them to other employers. To gild the lily, Respondent's counsel then asked Swalek, without objection from government counsel, if he would characterize such remarks as tantamount to saying that they would be discharged from their current positions with Respondent. Swalek answered in all candor, that he merely was trying to explain to the men what he thought would happen to them.

Swalek further conceded that on the morning before the election, Lollack asked to speak to him privately and in response to Lollack's request, promised to help him locate a general contractor or lender who could provide him favorable financial terms to purchase a house. As the conversation progressed, Lollack told Swalek he was so disturbed and undecided about the union election, he might not vote, or might simply follow the majority, Swalek encouraged him to make up his own mind.[9]

Office Manager Sheila Gardener corroborated much of Swalek's testimony regarding his comments to employees in the weeks preceding the election. For example, she confirmed that on one occasion, Swalek told a group of employees that ''if the Union did come in there would be a testing process, that they would be rated . . . . And according to what the Union base was . . . they would take a cut in pay

[8] Miller stated that in addition to Lefkofsky, employees Joe Miskuf, Dave Sabol, and Mark Lollack also attended the meeting.

[9] Lollack generally concurred with Swalek's version of their conversation although he was not sure of the date on which it occurred.

besides taking an hourly cut, as far as hours worked per week.'' (Tr. 625.) Another morning, he told the entire crew that he had to postpone implementing a 401-K plan and freeze wages until after the union election. As for closing the business, Gardener heard Swalek explain he could not increase the prices he charged customers to compensate for the increased costs that unionization would produce. Therefore, ultimately, he might have to close the business, but he assured the men that the Union would find them other jobs. She also corroborated Swalek's statement regarding the loss of paid vacations and health benefits if the employees selected the Union.

Allegations of Unlawful Layoffs

In early March, Sid and the employee with whom he generally worked, Harold Lefkofsky, completed a job and returned to the shop shortly before 1 p.m. According to Sid, when no outside assignments were available, Respondent's practice was to assign the workers to various chores in the shop for the balance of the workday. Contrary to this custom, on this occasion, Swalek sent the two men home early because of an alleged lack of work. On or about March 8, after informing the office that they were unable to enter a particular jousted, Sid and Lefkofsky again were released from work at 2 p.m. Sid testified that he had never before been sent home before the end of the workday during his year of employment with the Respondent. Lefkofsky echoed Sid's surprise at being sent home early, although he recalled similar occurrences when he first began working for Respondent in 1986. Miller, who also had been one of Respondent's senior employees, testified that during the winter months, junior employees might occasionally be sent home early. In fact, Mark Lollack and Tone Cooper, two of Respondent's newer employees, were sent home for lack of work on a few occasions in March, as was Jim Swalek, Respondent's most senior employee.

On the evening of March 7, Swalek telephoned Sid to tell him there was no work for him the following day. However, Sid learned that Lefkofsky, the partner he had assisted everyday that week, did work on March 8. Lefkofsky confirmed that he worked with Sid for the first 4 days of the week at an ongoing project, that no other employees were assigned to that same site, and that the project continued in subsequent weeks. Although he also believed that he continued working at the same site on Friday, March 8, his timecard shows otherwise.

Jim Swalek testified that he, not Lefkofsky, was Sid's partner on the week of March 4, and that he did not work on March 8 as he had to attend an out-of-town conference. Thus, Fred Swalek simply attributed Sid's March 8 layoff to a lack of work caused by his brother's absence.

Respondent Discharges Sid Nascianceno

After working for Respondent for a little more than 1 year, Sid was discharged on March 18. The parties offered divergent accounts of the circumstances attending that event.

Sid related that at 8 a.m. that morning, after the rest of the workhorse were assigned to various jobs, Swalek called him into his office and handed him a letter which stated that ''According to personnel records dating from the beginning of 1991, your absenteeism has been over and above what Foster Electric can tolerate.'' (G.C. Exh. 5.) When Swalek said he had missed 16 days of work, Sid was incredulous and asked if this included his vacation leave when he had traveled to Mississippi with Swalek's knowledge and consent, and 2 sickdays for which he had presented a doctor's excuse.[10] Swalek acknowledged that these periods of time were counted within the 16 days. Sid then reminded Swalek that another employee, Tony Cooper, had disappeared for 3 days at a time without saying a word in advance; that Mark Lollack always was sick and was junior to Sid in seniority, and that Chuck Miller also had a poor attendance record. Swalek allegedly responded that each of these examples presented different circumstances.

Prior to the union election, Respondent's attendance policy was unwritten and quite lax. A number of employees testified uniformly that they were supposed to telephone in advance if they had to miss a day's work and, as long as prior notice was given, no restrictions were placed on the number of unpaid days of leave one could take. Sid maintained that Swalek never before had warned him about his attendance or suggested that it was was a problem. He further explained that he had notified Swalek a month before he took unpaid leave, that he would be absent from March 12 through l6 when he and his wife would be visiting her family in Mississippi. Several of the employees, including Miller and Lefkofsky, also knew 2 or 3 weeks prior to March 11 that Sid would be absent at that time. Moreover, Sid said he reminded Swalek during the preceding week that he would be away on those dates. On Sunday evening, March 10, Sid telephoned Swalek and confirmed that there was work for him the following day. However, at 7 a.m. Monday morning, Sid called Swalek to tell him he would be unable to work that day because his child's babysitter was sick. Sid maintained that he again reminded Swalek that he would be gone for the balance of the week.

Swalek painted an entirely different picture of Sid's attendance pattern in the weeks preceding his discharge. First, Swalek maintained that Sid did not request that his days off on February 11, 14, and 15 be charged as vacation days until after he had been absent. He also denied that Sid had alerted him on February 27 and 28 that he was ill. Consequently, when Sid returned to work on March 1, Swalek claimed he told him he would have been fired had he not presented the doctor's note, and warned him he would be discharged the next time he failed to call in advance. On cross-examination, Swalek conceded that he had failed to mention in his 11 page affidavit to the Board that he had cautioned Sid on March 1 that he would be fired after the next absence.

Respondent's office manager, Sheila Gardener, corroborating Swalek's testimony in this regard, stated that she was present when Swalek verbally warned Sid on March 1. Further, Gardener offered testimony in support of Swalek's claim that Sid did not request time off in advance of his trip to Mississippi. She stated that on March 12, when Sid failed to appear for work, Swalek asked her to telephone him, just as she often contacted other absentee employees. When Gardener said that such a call would be futile because Sid was in Mississippi, Swalek indicated he was unaware of these travel plans. Although Swalek stated that he was peeved

[10] Sid testified that he called Swalek on each of these days and explained he was suffering from sinusitis.

when Sid did not report to work on March 11, apparently deferring to his wife's job as more important than his own, he initially decided to simply warn Sid. However, he reviewed the situation with Gardener who persuaded him that a discharge was warranted. He maintained that at the time of Sid's dismissal, he was unaware of his leadership role in the union campaign, although he knew through conversations that he was a union supporter and advocated the Union's apprenticeship program.

Sid was not the first employee whose discharge was attributed to absenteeism. Swalek and Gardener both recalled that two employees had been fired for this same reason, one in 1987, the other in 1988. Jim Swalek added that one of the two, a Jim Elder, was fired after 6 months on the job for he consistently failed to call in until late in the morning.[11] Several other employees were terminated during the preceding 5 years for falsifying company timecards.

The Election Eve Party and the Election

The union election was scheduled for March 22. On the eve of the election, when none of the employees appeared at the union hall as scheduled, Daugherty drove to Respondent's shop where he found Swalek, his brother Jim, and the rest of the staff enjoying pizza and sodas to celebrate a ''thank God it's all over'' party, referring to the election the following morning. Respondent had sponsored other parties, but on occasions such as Christmas and Thanksgiving. Daugherty asked, unsuccessfully, to see a copy of a memo prepared by Jim Swalek which compared the pros and cons of union representation with employment by Respondent. Several employees testified that in their view, the list was rather one-sided, listing mainly favorable comments about the Company and mostly negative aspects of union representation. However, Jim Swalek and Tony Cooper testified credibly that the memo set forth several advantages offered by the Union such as extensive benefits and education program.

Later that same evening, Fred and Jim Swalek joined three or four of the employees at a nightclub. Two of the employees were habitues of the night spot, but this was the first time that either of the Swaleks accompanied them. Fred Swalek left the group at midnight while Jim remained until 3 a.m.

The election was held the following morning. The Union lost by a vote of four to two with two challenged ballots: Sid's and Jim Swalek's. Chuck Miller testified that for about 3 weeks before the election, he declared his prounion stance by wearing a union pin on his shirt. Moreover, he wore a sweatshirt bearing the legend, ''Union Yes'' to the election. Thereafter, the Union filed objections to the election alleging misconduct by the Respondent coincident with the unfair labor practices alleged in the instant complaint.

Discussion and Concluding Findings

A. *Independent Violations of Section 8(a)(1)*

1. Unlawful threats of business closure

The complaint alleges, in substance, that Fred Swalek, made a number of statements about the adverse effects of unionization which interfered with the employees' right to organize without restraint or coercion. One of the most serious allegations was that Swalek repeatedly threatened the employees with plant closure if they selected the Union to represent them. Respondent vigorously denies this accusation, insisting that Swalek's comments about the future of his business constituted protected speech within the meaning of Section 8(c) of the Act.

Clearly, an employer's threat to close a plant if the employees opt for union representation violates Section 8(a)(1). At the same time, Section 8(c) safeguards an employer's right to express his views or opinions, as long as ''such expression contains no threat of reprisal or force or promise of benefit.'' In other words, an employer's right to free speech is not absolute; it must be balanced against the employees' right to organize or refrain from organizing, free of coercion, restraint, and interference.

One of the more sensitive issues in balancing rights of an employer under Section 8(c) against those of employees under Section 7 is to determine whether an employer's remarks about plant closure during a union organizational campaign are permissible predictions or threats proscribed by Section 8(a)(1). In drawing the fine line between these two, *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969), provides the following guidance:

> [a] prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control. . . . If there is an implication that an employer may or may not take action on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts, but a threat of retaliation based on misrepresentation and coercion.

Recognizing that ''employer predictions of closedown upon unionization are inherently fraught with overtones of reprisal,'' employers are under a ''severe burden'' to justify such statements. *Zim's Foodliner v. NLRB*, 495 F.2d 1131, 1137 (7th Cir. 1974). *Gissel* instructs employers to be particularly careful when they predict adverse effects that unionization may have on their business for their comments may have an enormous impact on employees who, because of their economic dependence, might cause them ''to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.'' 395 U.S. at 617.

The record in the instant case indisputably discloses that Swalek often made comments about having to close his shop during the preelection period. On some occasions, Swalek undoubtedly connected the likelihood of plant closure to his

[11] Respondent's records indicate that Elder worked for the Company for only 4 months.

conclusion that he would lose contracts with current clients as a consequence of having to raise his costs to pay the Union's wage and benefit package. However, several witnesses, Miller and Lollack to be precise, both testified that Swalek also stated without qualification, that he ''would close his doors if we went union.'' I found Miller to be a credible witness even though he parted company with the Respondent on unfriendly terms. Lollack, a current employee, also was credible in this regard, particularly since his testimony was driven by a desire to please his employer.[12] Their recollection of Swalek's statements establish that he did not always tie the Company's demise to objective fact or to ''demonstrably probable consequences beyond his control.'' The statements which Miller and Lollack reported were beyond the pale of protected speech—they were unadorned, coercive threats and could not be perceived in any other way by an employee whose job security was at stake.

Even Swalek's predictions of business failure, couched in terms of high union costs and loss of customers, do not pass muster under a careful *Gissel* analysis. To be sure, the first two steps in Swalek's syllogism had the ring of objective truth: union wage scales and benefits may have been more costly than those which Swalek paid his workers, and this could have led Respondent to pass on these expenses to clients in the form of higher bids. Some of these clients might well have turned to less costly electrical contractors in future business dealings. But this does not tell the whole story. Swalek made an enormous leap in concluding that the loss of some customers would inevitably mean the death of his company. In making this leap, he conveniently chose to disregard some positive objective facts. First, he failed to take into account Daugherty's assurances that the Union did not demand an instant transition from a nonunion to a union-oriented business. Second, he failed to consider the possibility of doing business with unionized contractors and ignored Daugherty's advice to consult with a named representative of the electrical contractors' association who could instruct him in bidding practices during the transition phase. It stands to reason that Daugherty's interest in assisting and accommodating a small business such as Respondent's was genuine, for neither the Union nor its members would be well served if Swalek was forced to close his doors. In short, Swalek's prediction of business failure was built on his premise that he could not compete with the same customers he previously had served as a nonunion firm. In doing so, he ruled out the fact that, henceforth, as a unionized shop, he would be in a position to compete on new terms with new clients.

Respondent's situation in this case cannot be compared to that of the restauranteur in *NLRB v. Village IX, Inc.*, 723 F.2d 1360, 1367–1368 (7th Cir. 1983), who, the court found, had objective support for predicting the consequences of unionizing by pointing to the competitive nature of the restaurant business and to the fact that only one restaurant in the area was unionized, and it was doing badly.[13] Here, Respondent produced no evidence whatsoever as to the number of nonunion or unionized contractors in the area, or that it would be unable to compete in the organized arena. In fact, Lollack testified without controversion that Swalek alluded to the number of unionized electrical firms in the area. If this was the case, then it is reasonable to assume that sufficient work was available to keep those firms in business. In sum, Swalek's prediction of business closure based on an inability to compete was grounded neither on fact or ''demonstrably probably consequences beyond his control.'' *Gissel Packing Co.*, supra at 618. Since Respondent has failed to meet its burden of justifying statements of shop closure on objective evidence, I conclude that Swalek's numerous threats in this regard violated Section 8(a)(1) of the Act.

2. Other threats

In support of the allegation that Respondent threatened employees with a decrease in hours and wages if they voted for the Union, the government presented uncontroverted testimony that Swalek told the employees that with union representation, their starting wage would be approximately $5.30 an hour and that attendance at apprenticeship training school would limit them to 32 hours of work a week.

Some of the same employees who testified about Swalek's comments as to earnings and hours under the Union, also said, in answer to Respondent's question, that Swalek never threatened them with a decrease in pay. Their answers suggest that they took the question posed quite literally. What they apparently did not realize is that inferential threats can be as effective as those which are literal.

When Swalek talked about a $5.30-per-hour union wage, he was not simply passing along what he believed was honest information in a neutral manner. Set in context, his subtext was that if you vote for the Union, I will be compelled to lower your wage to accord with the lowest wage the union offers. He failed to explain to the employees that the wage rate they received would depend on how well they fared on the Union's nonfail placement test, or that he could ''redline'' (i.e., preserve) their current wages. He also failed to discuss the prospect of overtime pay which could compensate for the hours spent in apprenticeship training. By spelling out the worst case scenario as if lower wages and hours were the inevitable outcome of union representation, Swalek delivered a message marred by half-truths and omissions which amounted to nothing less than scare tactics. His motive in making such pronouncements is not an essential element in finding a violation of Section 8(a)(1). What is relevant is that Swalek's statements reasonably tended to interfere with, restrain, and coerce employees in the free exercise of their Section 7 rights.

It is true that Swalek subsequently informed the workers that the Union's entry level wage was $7.12, not $5.30 an hour. However, the Respondent failed to adduce sufficient evidence to satisfy its stringent burden under *Passavant Memorial Hospital*, 237 NLRB 138, 138–139 (1978), that Swalek effectively cured his earlier unlawful statement.

[12] The Board often attaches special weight to the testimony of a current employee who testifies against his own employment interest. See *Midwestern Mining & Reclamation*, 277 NLRB 221 fn. 1 (1985).

[13] Writing for the Seventh Circuit in *Village IX*, supra at 1368, Judge Posner, pointing to the shift of industry from North to South, observed that ''It is well known that union wage demands sometimes result in plant closings.'' While Judge Posner may have had a factual basis to support his assertion, no facts were adduced in this case to support Respondent's claimed prediction of disaster. Common experience instructs that the need for electrical firms is widespread and exists in every quarter of the country.

Passavant requires a repudiation to be timely, unambiguous, specific in nature to the coercive conduct, free from other proscribed conduct, adequately published to the employees involved, accompanied by assurances that the employer will not interfere with the employees' Section 7 rights in the future and not followed by an additional illegal conduct. Ibid. Accord: *Mohawk Liqueur Corp.*, 300 NLRB 1075 (1990), enfd. sub nom. *Distillery Workers Local 42 v. NLRB*, 951 F.2d 1308 (D.C. Cir. 1991). Here, there was no showing that Swalek's subsequent comments about the Union's starting wage was delivered in an unambiguous manner to all the employees, or that Swalek assured them they would not necessarily receive the lowest pay rates in the union scale, as he previously implied. Moreover, as discussed further below, Respondent continued to engage in unlawful conduct in its effort to defeat the Union. In sum, since Swalek did not adequately correct his unlawful statement to employees about reduced wages if they endorsed the Union, it remained an uncured unfair labor practices. See *Taylor Chair Co.*, 292 NLRB 658 fn. 2 (1989).

Swalek also did not deny contrasting his own lenient sick leave and tardiness practices with the much ruder treatment the employees should expect when working in a unionized shop. His words conveyed an implied threat which, as an analytic matter, differ little from his statements about reduced wages and plant closure. He presented his view of the workers' plight under union domination as if it was fact, when, in reality, he conjured up a fantasy. In violation of Section 8(a)(1) of the Act, Respondent's comments that the employees could expect rigid employment conditions should they select the Union, tended to restrain and coerce them in their right to freely choose or reject the Union as their collective-bargaining representative. See *Honda of San Diego*, 254 NLRB 1248, 1251 (1981).

3. Unlawful promises of benefits

The complaint also alleges that Swalek promised the employees additional benefits if they rejected the Union; specifically, (1) a 401-K retirement plan, (2) wage increases, and (3) reimbursement for technical training. Respondent attempts to refute these accusations by contending that rather than attempting to influence employee opinion against the Union, it withheld granting benefits in the preelection period to avoid the appearance of impropriety in accordance with Board rules.

The number of employees, Sid included, recalled that Swalek first raised the matter of a 401-K pension plan in the summer of 1990. Accordingly, Respondent reasons that the plan was not introduced as an antiunion gambit. Moreover, Respondent claims credit for deferring consideration of the plan as the Board requires during a preelection period. By the same token, Respondent contends that it acted properly in withholding raises even though they were overdue for several employees.

Although the record supports Respondent's claim that Swalek generally introduced the concept of a pension plan some months before the Union appeared on the scene, it does not follow that when Swalek mentioned it again in the weeks before the election, it was a matter of pure coincidence. Curiously, the evidence fails to show that Swalek made any reference to such a plan between the summer of 1990 and February 1991. Suddenly, in the critical weeks prior to the election, talk of the plan revived and this time, in quite specific terms. Thus, Swalek showed Miller a brochure relating to pensions and described different ways a plan could be implemented. He also told the employees that he had scheduled an appointment with a pension consultant. Having dangled a real prospect of a pension plan before his employees, he then withdrew it in a mock display of good-faith compliance with Board preelection precepts.

The tactic of promising a benefit and then withholding it, purportedly to avoid committing an unfair labor practice, is familiarly known as the ''carrot and the stick'' approach and is condemned as interference. See *Goodyear Tire Co.*, 170 NLRB 539, enfd. as modified 413 F.2d 158 (6th Cir. 1969). The Board's general rule is that an employer's legal duty during a preelection period is to grant those benefits which would have been bestowed to employees in the normal course even if the union had not been on the scene. See, e.g., *American Telecommunications Corp.*, 249 NLRB 1135 (1980).

Under these principles, if Swalek previously had promised to implement a pension plan, he would have been permitted to do so regardless of the election. If he made no such commitment, and the evidence indicates he had not, he should not have suggested in February that he would have granted this benefit but for the election. By reviving the employees hopes for a pension plan, and then dashing them allegedly because of the forthcoming election, Swalek subtly transferred blame to the Union for the denial. Swalek treated the deferral of pay raises in the same manner.[14] In this way, Respondent impermissibly manipulated the pension and wage rate issues in order to influence his employees' attitude toward the Union. In so doing, Respondent violated the Act. *NLRB v. Otis Hospital*, 545 F.2d 252, 254–255 (1st Cir. 1976).

There was nothing subtle about Respondent's offer to pay tuition to a technical college for employees Sabol and Miller, both of whom had expressed interest in the Union's training program. It was a straightforward quid pro quo: Swalek promised the employees a benefit as a tradeoff for rejecting the Union.[15] Little discussion is needed to find this conduct contravenes Section 8(a)(1).

4. Interrogation

Respondent also is accused of engaging in unlawful interrogation, based on Swalek's asking two employees, Miller and Lefkofsky, how they felt about the Union. Under *Rossmore House*, 269 NLRB 1176, 1177 (1984), enfd. 760 F.2d 1006 (9th Cir. 1985), interrogation will be held unlawful if, under all the circumstances, it reasonably tended to restrain, coerce, or interfere with rights guaranteed by the Act.'' Among the factors to be considered in analyzing alleged interrogations are ''(1) the background; (2) the nature

[14] As detailed at above, Lefkofsky, who was in Respondent's employ at the time of the instant trial, testified credibly that Swalek told the men that both the Union's appearance and a delinquent client prevented him from giving them well-deserved raises.

[15] Sid testified that Swalek offered this benefit to Sabol who was his cousin. Sabol denied that such a promise was made in very general terms while Swalek was not questioned about this issue. I find Sid's testimony, which was quite precise in identifying the beneficiary of Swalek's generosity, more credible than Sabol's vague denial. I have credited Miller before and do so again here.

of the information sought; (3) the identity of the questioner; and (4) the place and method of interrogation.'' Id. at 1178 fn. 30.

Swalek ran the Company in an informal manner; he had frequent give and take with the employees, particularly in the morning as they gathered in the office before embarking on their daily assignments. The record indicates that on such occasions, employees frequently put questions to Swalek about the Union. However, this was not the comradely setting in which the interrogations at issue here took place. In Miller's case, Swalek asked him to wait while he had a private interview with another employee. He then called Miller into his office where at the start of their one-on-one conversation, Swalek asked how he felt about the Union. Thereafter, Swalek raised the prospect of a pension plan and assistance with technical training. Unlike Miller's meeting, Lefkofsky initiated his exchange with Swalek in order to press him for a raise. After asking Lefkofsky how he felt about the Union, Swalek resisted his entreaties for a raise while reminding him that union apprentices received only $5.35 an hour for a 32-hour week. He also implied that if Lefkofsky did not qualify as a journeymen, he probably would be out of a job with Foster Electric.

Neither Miller nor Lefkofsky were overt union supporters nor did they appear to have much knowledge about the Union or experience with organizational campaigns. Their private conversations with their employer were held under somewhat confidential circumstances. Swalek's seemingly off-hand question was posed in the context of promised benefits to Miller and veiled threats to Lefkofsky. Swalek seems to have been less interested in how these employees answered his questions than he was in planting in their minds a connection between their support for the Union and his largess. In the circumstances present here, I find that Swalek's questions were inextricably woven into coercive communications with the employees which tended to restrain and interfere with their exercise of Section 7 rights.

B. *The 8(a)(3) Violations*

1. The March 1 and 4 layoffs were not unlawful

Paragraph VI, (a) and (b) of the complaint alleges that by sending a number of employees home early without pay on or about March 1 and 4, Respondent violated Section 8(a)(3) and (1) of the Act. I do not find that the evidence supports these allegations.

To prove that Respondent engaged in discriminatory conduct, the General Counsel initially must prove each element of a prima facie case; that is, that the employees were engaged in union activity, that the employer knew of that activity, and that such knowledge was a motivating factor in its decision to take adverse action against them. If the Government succeeds in meeting its burden, the Respondent then must prove that it would have taken the same action even in the absence of the employees' union activity. See *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Proof of Respondent's antiunion animus is more than sufficient here. Swalek's bias was laid bare by his repeated warnings during the preelection period that the Union would have a disastrous impact on his business, by his elicit efforts to lure the employees away from supporting the Union with the bait of benefits, and by telling them they should quit if they wanted to belong to the Union.

Given Sid's and Lefkofsky's prounion expressions at employee meetings, Swalek surely had reason to assume that they were engaged in union activity. If Swalek had any doubt about Sid's involvement, it was put to rest when Daugherty identified Sid as the source of at least one of the accusations in the charge filed with the Board. However, the conversation between Daugherty and Swalek during which Sid's role came to light did not occur until March 7, several days after the dates on which the employees were sent home early from work. Further, although in a small shop like Respondent's, it hardly seems likely that the employees' predilections either for or against the Union would be hidden for long, direct evidence is lacking which might establish that Swalek also was aware of Lollack's and Cooper's attitudes toward the Union.

Evidence that Respondent's employment decision was discriminatory motivated is not altogether persuasive. It is true that some employees testified that in recent times, Swalek had given them tasks around the shop rather than send them home early. However, they recalled that in the past, there had been occasions when Swalek sent them home if they completed their work early, particularly during the slow winter months. Sid had no prior experience with such temporary layoffs since he had been employed only for a year. Aware of Swalek's antiunion bias, as manifested most dramatically by his shop-closing remarks, Sid had some cause to assume that his partial layoff was part of a pattern of retaliatory activity against union supporters. If Sid had been the only employee to be sent home early, Respondent's motives might have aroused greater suspicion. However, Respondent sent four employees home on separate days in early March. Lollack and Cooper were sent home twice even though they were not conspicuous union proponents. Given these circumstances, I am not persuaded that Respondent's conduct was motivated by discriminatory causes.

2. Sid's March 8 layoff was in violation of Section 8(a)(3)

I reach a different conclusion about Sid's March 8 layoff. Swalek's decision to target him for layoff, and subsequently, for discharge, must be viewed in the context of his antiunion animus, and his admission that he knew from ''shop talk'' that Sid was a union supporter. Moreover, Respondent did not controvert Sid's account of the February meeting at which he challenged Swalek's misrepresentation of the Union's starting wage and then, attempted, without success, to arrange a meeting at the shop at which Daugherty would speak to the employees. At this same meeting, Swalek told Sid that if he ''wanted the union so bad'' he should apply to the apprenticeship program, implying that support for the Union was incompatible with remaining in Respondent's employ. Significantly, it was on March 7 that Swalek, obviously upset at being dragooned into Board proceedings, learned from Union Business Agent Daugherty that Sid was a complainant in the unfair labor practice charge filed the week be-

fore.[16] That very evening, Swalek telephoned Sid to tell him he was laid off for the following day. The timing between Daugherty's phone call to Swalek and Swalek's phone call to Sid provides reason to infer that Swalek denied work to Sid in retaliation for his engaging in union activity and supplying information to the Board.

In addition, the General Counsel adduced evidence showing that Sid was Lefkofsky's partner on 3 of the 4 preceding days that week. Lefkofsky worked on Friday as well, indicating there was work to be done. The failure to assign Sid to assist Lefkofsky on Friday casts doubt on the bona fides of Respondent's motives.

Respondent justifies the March 8 layoff by contending that Sid was paired with Jim Swalek and since Swalek had to be absent on that date, there was no work for Sid. Respondent also claims that since the volume of work was light then, and Sid was low in seniority, he was the most obvious candidate for layoff. The documentary record supports neither of Respondent's contentions. Respondent's own business records establish that Lefkofsky, not Swalek, was Sid's partner that week. Therefore, Swalek's absence should have had no bearing on Sid's assignment that day. Further, contrary to Respondent's assertions, Cooper, not Sid was the most junior employee. If seniority was a factor, and Respondent actually needed to lay off an employee, then Cooper, who was hired 2 to 3 months after Sid, should have been selected for layoff. The fact that Cooper had been assisting another electrician that week is irrelevant since helpers frequently were assigned to work with various partners.

In light of the foregoing considerations, it is evident that Respondent failed to produce any credible evidence that Sid was laid off for nondiscriminatory reasons. By relying on totally false facts, Respondent demolished its own defense and left little doubt that its asserted reasons were pretextual.

3. Sid's discharge was unlawful

Apparently, Respondent was not satisfied with simply laying off Sid for a single day. On March 18, it discharged him for reasons which I also find were pretextual. Prior to his termination, Sid had not been warned or reprimanded about his attendance.[17] In fact, in January, before the start of the union campaign, Respondent had rewarded him a pay raise which was based on merit and length of service.

Swalek told Sid he was being discharged because he had missed 16 days of work in 1991. Swalek's numbers were wrong. Respondent's attendance records show that Sid missed a total of twelve days. One day in January was credited to illness, five in February were taken as paid vacation days and the rest in March were attributed to personal reasons. Thus, there was no day for which Sid failed to account, something which could not be said of another employee who simply disappeared for 3 days without excuse.

As discussed above, Respondent had a liberal leave policy. Indeed, Swalek contrasted his tolerant attendance practices with the rigid conditions he said employees would encounter under a union regime. Up to the time of Sid's discharge, employees could take 5 paid vacation days which could be assigned after the fact and an unlimited number of unpaid personal days for any reason as long as they gave advance notice. In accordance with these policies, Sid used 2 of his 5 vacation days when he was absent on February 27 and 28 due to a sinus condition. Although he returned to work with a doctor's note, Swalek chose to regard these absences as unexcused and held Sid accountable for them. Gardener attempted to explain this anomaly by claiming that absences are excused and recorded as vacation days only when the employee schedules such leave in advance. Therefore, she reasoned that Sid's absences were unexcused because he had not requested such leave ahead of time. Yet, the record shows that other employees who were injured or experienced emergencies were granted vacation leave after the fact. For example, one employee, Miller, took vacation leave after he was injured on the job; another, Sabol, was accorded vacation leave after taking time off due to a death in the family. The attendance records of these employees show that their absences were not recorded as unexcused. Gardener attempted to rationalize Respondent's disparate treatment of these employees by suggesting that neither one could have anticipated in advance the circumstances which led to his requesting vacation leave. But neither was Sid in a position to know he would be ill at the end of February.

Respondent's willingness to bend the truth in order to justify Sid's discharge is most apparent in the way in which his trip to Mississippi was treated. Sid maintained that he had mentioned this trip to Swalek weeks in advance; Swalek denied he knew anything about it. Sid's testimony is the more credible for it is illogical to believe that he would tell his fellow workers and the office manager of his impending journey, but fail to inform his employer, particularly when Daugherty had cautioned him to be a model employee throughout the union campaign.[18]

Even assuming that Swalek forgot that Sid requested personal leave in advance of his Mississippi trip, Gardener reminded him of it on the morning of March 12. Thus, Respondent did have prior knowledge that Sid was taking personal leave and, nonetheless, refused to excuse his absence. Respondent obviously had one attendance policy for its prime union activist and another for the rest of its staff, holding Sid to account for absences which would have been excused if its policy was applied in a neutral manner.

Respondent contends that Sid was treated no differently than two other employees who were discharged in 1988 for excessive absenteeism. In support of this contention, Respondent introduced attendance records for a Kelly Morris which indicate that he had five unexcused absences in a 2-month period, while those for Jim Elder show he had nine unexcused absences in less than 3 months. However, since

[16] According to Daugherty's uncontroversial testimony, when he telephoned Respondent on March 7, Swalek demanded to know, ''what I had gotten him into.'' (Tr. 78.)

[17] Swalek alleged that he cautioned Sid on March 1, the day he returned from a 2-day illness, that his next absence would result in discharge. Sid claimed that Swalek merely told him that his attendance record would not be tolerated in an organized shop. In buttressing Swalek's testimony, Office Manager Gardener claimed that his warning to Sid was overheard by all the employees who were standing nearby; yet, none of those who testified recalled Swalek making such a threat. I conclude, therefore, that Swalek did not deliver this last-chance warning to Sid on March 1.

[18] If, as Respondent contends, Swalek warned Sid on March 1 that the next absence would be his last, there is even less reason to believe that Sid would absent himself for 4 days without notifying his employer.

Sid's absences would have been excused if Respondent had applied its attendance policy in a neutral manner, his attendance record cannot fairly be compared to those of Morris and Elder.

Respondent suggested in its brief that in addition to his alleged attendance problem, Sid's poor work performance also justified his termination. Respondent apparently overlooked Swalek's unequivocal testimony that he fired Sid solely because of his poor attendance. Moreover, the record shows that virtually all the complaints about the quality of Sid's work referred to incidents which occurred in 1990. Any inadequacies which may have marred Sid's work in the first year of his employment apparently disappeared for in January 1991 he received a $1-an-hour raise.

In the final analysis, Sid's absences were not the real reason for his discharge, as lack of work was not the real reason for his layoff. Rather, Respondent used his alleged attendance problem as a smokescreen to conceal a discriminatory intent. By its layoff of Sid on March 8 and by terminating him on March 18 in order to rid itself of a union supporter 4 days before the election, Respondent violated Section 8(a)(3), (4), and (1) of the Act.[19]

C. *The Election Results Should be set Aside*

The record establishes that at the time he sought voluntary recognition and when he filed a petition for an election on February 14, Daugherty had in his possession seven valid authorization cards from all but one of Respondent's employees.[20] Yet, when the ballots were counted, the votes were four to two against the Union, with two challenged ballots, Sid's and Jim Swalek's.[21]

The Union filed timely objections to the election on March 29 alleging that the Respondent tainted the election results by engaging in repeated unfair labor practices, and on the day before the election, by promising certain benefits to Mark Lollack and treating the employees to a pizza party to celebrate the end of the union campaign.

Finding that substantial issues were raised by the Union's contentions, the Regional Director certified the matter for a consolidated administrative hearing. As found above, the Respondent committed numerous and serious unfair labor practices which reached every unit employee during the critical period preceding the election. Those findings do not need to be repeated here. What remains to be evaluated are the Union's objections to Swalek's conduct on the brink of the election.

Daugherty's objections to Lollack's meeting with Swalek on the day before the election were based on reports by a few employees who overheard some remarks pass between the two men. However, the testimony of the participants reveals that Swalek did not initiate the meeting, and promised Lollack only that he would put in a good word for him with a housing contractor or financial institution. I do not find that Swalek's offer of such assistance amounted to a promise of a benefit since Swalek had no control over whether Lollack eventually would get a loan. Moreover, Swalek might have obliged Lollack with this small favor even without an election the following day. Further, there was no evidence that Swalek urged Lollack to vote one way or another; rather, by all accounts, he simply urged him to vote independently. However, Swalek did cross the line between permissible and impermissible conduct when he again raised the specter of his going out of business should the Union prevail. This was not the first time Lollack had heard such statements. With the election less than 24 hours away, Swalek's repetition of this dire prophecy gave it added force and was certain to have an impact on an easily influenced employee like Lollack, a man who admittedly was willing to follow the crowd. I have already found that Swalek's comments about plant closure constituted unfair labor practices. Where, as here, an employer repeats such remarks at the 11th hour to an equivocal employee, he must be held responsible for objectionable conduct which undermines a fair election.

Contrary to Daugherty's assertion, Swalek did not overtly lobby his employees to vote against the Union at the ''thank God its over'' party which he sponsored on election eve. All of those who attended the informal after-hours gathering in Respondent's office and who later spent the evening in a nightclub testified credibly that discussion of the Union was out of bounds. However, lobbying takes on many forms and under the circumstances present here, I am persuaded that Swalek engaged in effective lobbying.

Swalek had given similar parties in the past, but always in connection with a traditional holiday such as Thanksgiving or Christmas. In holding a gathering on this occasion, he did not have to say a word to convey to his employees that he was a thoughtful, benevolent employer who had his their well-being at heart.[22] In joining some of the employees for the first time at a local club, he also signaled that he was just one of the boys, a regular fellow. Why, one might ask rhetorically, would anyone want such a boss to go out of business. Normally, parties are held after the fact to celebrate a victory; Respondent's party preceded the election to ensure there would be no victory at the polls the following day. If Swalek had no interest in manipulating the employees, all he had to do was delay the ''thank God its over'' party until the election was over. In hosting this party on the eve of the

[19] Sec. 8(a)(4) provides that an employer commits an unfair labor practice by discharging or otherwise discriminating against an employee ''because he has filed charges or given testimony under this Act.'' Given Swalek's angry reaction to the Union's filing unfair labor practice charges, it is reasonable to infer that he retaliated against Sid in part because he learned that the employee had contributed information on which those charges were based.

[20] Each employee signed the card and filled in his social security number, address, and phone number below the text which stated:

> I authorize Local Union No. 697 of the International Brotherhood of Electrical Workers to represent me in collective bargaining 45 with my present and future employers on all present and future jousters within the jurisdiction of the Union. This Authorization is nonexpiring, binding, and valid until such time as I submit a written revocation.

[21] Because the challenged ballots were insufficient in number to affect the results of the election, no ruling is required as to the legitimacy of the challenges. However, if Jim Swalek's status was in issue, I would find that his ballot was properly challenged since, as the brother of the Company's part-owner and manager, he was not an appropriate member of the bargaining unit. See *NLRB v. Action Automotive*, 469 U.S. 490 (1985).

[22] It takes no great acumen or special expertise to know that lobbyists use a variety of tactics in their efforts to influence public officials. For example, they may provide free trips to golf resorts or paid luncheons at posh restaurants. The lobbyist need not say a word about his favorite project. The lobbied official knows that unalloyed altruism does not account for the lobbyist's generosity.

election, Respondent impermissibly interfered with the employees' rights under the Act.

Respondent's unfair labor practices and other objectionable conduct made it impossible for the employees to exercise a free and uncoerced choice in the election. Accordingly, the election results must be set aside in Case 1–RC–18184 and that proceeding be dismissed in accordance with the conclusion detailed below that a bargaining order should issue.

D. *A Bargaining Order is Required*

When the Union requested voluntary recognition from the Respondent, it had achieved majority status in the appropriate bargaining unit. Because of Respondent's unfair labor practices, and other objectionable conduct, it lost that majority. In such circumstances, the Board may issue a bargaining order if the violations are such that they are likely to have serious and long-lasting adverse effects which preclude the possibility of holding a fair election. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

In determining whether a bargaining order is warranted in this case, it is necessary to turn first to the applicable principles outlined in *Gissel*. There, the Supreme Court described two categories of cases in which a bargaining order was appropriate: (1) ''exceptional'' cases marked by ''outrageous'' and ''pervasive'' unfair labor practices, and (2) ''less extraordinary'' situations where the employer's misconduct was ''less pervasive'' but had a ''tendency to undermine [the Union's] majority strength and impede the election process.'' Id. at 613–614. In finding that a bargaining order is necessary here, I conclude that the Respondent's unfair labor practices and objectionable conduct come within the second *Gissel* category for the following reasons.

From the time that Daugherty requested voluntary recognition to the very eve of the election, Swalek engaged in numerous unfair labor practices including threats, promises of benefits, and discharge. Among the most serious of threats were those in which Swalek predicted the loss of his business, repeated on numerous occasions to every employee in the shop. Sometimes, this threat was presented as the inevitable consequence of higher union labor costs; at other times, the threat was expressed in simple, uncomplicated terms, with Swalek telling employees the Company would fold if the Union came in. On several occasions, Swalek ruefully indicated that given the Union's rules governing the ratio of journeyman to apprentices in a shop, he would be unable to retain the employees. He also told several workers who seemed to favor the Union, that they should quit and enter the apprenticeship training program. Although the language and the circumstances varied, Swalek's recurring message was to equate union membership with job insecurity.

Other threats were somewhat less egregious, but their coercive nature was none the less significant. Swalek incorrectly told the workers that the Union's starting wage was approximately $5.30, insinuating that this was the scale they could expect. At the same time he accentuated the negative by pointing out that their wages and working hours would be reduced, he eliminated the positive by failing to mention that their wages could be pegged to current levels or that overtime pay could compensate for lost hours. He also suggested that his own lenient attendance practices would evaporate in an organized shop.

On the one hand, Swalek conjured up a parade of evils should the Union prevail, while on the other, he painted a rosy picture of life with the Respondent if the Union was rejected. Thus, he promised that pay raises would be granted and a pension plan installed when he no longer had to abide by Board rules imposed during the critical preelection period. He also offered several employees tuition aid to counteract the attraction of the Union's training program.

Finally, with the election 4 days away, Respondent first laid off and then terminated the most vocal union supporter. No act could send a clearer message to employees of the price to be paid for exercising statutory rights.

In finding a bargaining order appropriate in *Koons Ford of Annapolis*, 282 NLRB 506, 508 (1986), the Board recognized

> that threats of job loss (i.e., plant closure, discharge and layoff) because of union activity are among the most flagrant interference with Section 7 rights and are more likely to destroy election conditions for a lengthier period of time than other unfair labor practices. Indeed the natural and likely result of the threats found here was to reinforce the employees fear that they would lose employment if they persisted in their union activity.

Accord: *Salvation Army Residence*, 293 NLRB 944, 988 (1989). Here, Respondent committed serious unfair labor practices such as those condemned in *Koons Ford* and *Salvation Army*. Swalek, Respondent's manager, the one person who was solely responsible for the repeated acts of misconduct found above, continues to run the firm singlehandedly and has daily hands-on contact with the staff. Two of the men in the original unit continued to be employed by the Respondent and at least one of them, clearly was very much swayed by his employer.[23] In this case, where Swalek was responsible for serious and pervasive unfair practices, the effect of such conduct is lasting and cannot be eradicated by the mere passage of time or by the Board's usual remedies. Requiring the Respondent to refrain from engaging in unlawful activity is hardly likely to overcome the lingering effects of his former behavior. Here, a second election could not provide the employees a forum in which they could exercise a truly independent choice. Accordingly, I find that the employees' interest in union representation, once expressed through authorization cards, would be better served by issuance of a bargaining order.

It follows that the Respondent shall be required to bargain with the Union as the exclusive representative of employees in an appropriate unit as of the date that Daugherty requested voluntary recognition.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Board's exercise of jurisdiction in this matter will effectuate the purposes and policies of the Act.

[23] If Jim Swalek is included in the unit, then, of course, three employees remain on Respondent's employment rolls who were involved in the initial union campaign of course, if Sid returns to Foster Electric, he would be the fourth of the seven employees who signed authorization cards.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by:

(a) Threatening its employees with closure of the business and loss of 15 jobs if they chose the Union as their bargaining agent.

(b) Impliedly threatening employees with a decrease in pay and a loss of benefits by imposing stricter working conditions if they selected or supported the Union.

(c) Promising employees benefits including a 401-K pension plan, wage increases and paid technical training, in order to discourage them from selecting or supporting the Union and impliedly blaming the Union for the failure to grant wage increases and implement the pension plan during the preelection period.

(d) Coercively interrogating employees concerning their union sympathies.

4. The Respondent violated Section 8(a)(1), (3), and (4) of the Act by laying off and discharging an employee, Sid Nascianceno, because he supported the Union and furnished information underlying charges filed with the Board.

5. The following unit is appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and part-time electrical workers, electricians, and helpers employed at the Employer's facility presently located at 8344 Kennedy Avenue, Highland, Indiana; but excluding all managers, clerical employees, professional employees, guards and supervisors as defined in the Act.

6. Since on or about the end of November 1990, and at all times material thereinafter, the Union represented a majority of employees in the above-described unit, and has been the exclusive representative of these employees for purposes of collective bargaining within the meaning of Section 9 of the Act.

7. The unfair labor practices outlined above affect commerce within the meaning of Section 2(6) and (7) of the Act.

8. By committing the unfair labor practices outlined above, by again threatening plant closure during a private meeting with an employee on the day before the election, and by sponsoring a party for the employees on the eve of the election, Respondent interfered with the representation election held on March 22.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1), (3), and (4) of the Act, I shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the purposes and policies of the Act.

Specifically, the Respondent shall be directed to offer employee Sid Nascianceno immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed. Further, Respondent shall be ordered to make him whole for any loss of earnings and other benefits, computed on a quarterly basis, from date of discharge to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent also shall be instructed to remove from its files any reference to Nascianceno's unlawful discharge and notify him that this has been done and that any such documents will in no way be used against him.

Respondent also shall be ordered, on request, to bargain collectively with the Union as the exclusive collective-bargaining representative of the employees in the above-described unit.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[24]

ORDER

The Respondent, Foster Electric, Inc., Highland, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees with closure of the business and loss of jobs if they chose the Union as their bargaining agent.

(b) Impliedly threatening employees with a decrease in pay and a loss of benefits by imposing stricter working conditions if they selected or supported the Union.

(c) Promising employees benefits including a 401-K pension plan, wage increases and paid technical training, in order to discourage them from selecting or supporting the Union and impliedly blaming the Union for the failure to grant wage increases and implement the pension plan during the preelection period.

(d) Coercively interrogating employees concerning their union sympathies.

(e) Laying off or discharging employees because they support the Union or provide evidence which leads to the filing of unfair labor practice charges.

(f) Refusing to recognize and, on request, bargain with the Union as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time and part-time electrical workers, electricians, and helpers employed at the Employer's facility presently located at 8344 Kennedy Avenue, Highland, Indiana; but excluding all managers, clerical employees, professional employeees, guards and supervisors as defined in the Act.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer employee Isidro Nascianceno immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed. Further, Respondent shall be ordered to make him whole for any loss of earnings and other benefits, computed on a quarterly basis, from date of discharge to the

[24] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent also shall be instructed to remove from its files any reference to Nascianceno's unlawful discharge and notify him that this has been done and that any such documents will in no way be used against him.

(b) On request, recognize and bargain with Local Union 697, International Brotherhood of Electrical Workers, AFL–CIO, as exclusive bargaining representative of the employees in the above-described unit, with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Highland, Indiana, copies of the attached notice marked ''Appendix.''[25] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

IT IS FURTHER ORDERED that the election held on March 22, 1991, in Case 13–RC–18184 is set aside and that the petition in that matter is dismissed.

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[25] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''